

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF INDIANA  
NEW ALBANY DIVISION

IN RE: : CASE NO. 10-93904-BHL-11  
EASTERN LIVESTOCK CO., LLC, : (Judge Basil H. Lorch III)  
Debtor. :  
: **REPLY OF THE FIRST BANK AND**  
: **TRUST COMPANY TO EASTERN**  
: **LIVESTOCK TRUSTEE'S**  
: **OBJECTION TO FIRST BANK'S**  
: **MOTION TO MODIFY PLAN**  
: **INJUNCTION**  
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I. INTRODUCTION

First Bank and Trust Company ("First Bank") simply wants to move proceedings forward to conclusion and is not being litigious or disruptive. Rather, First Bank has a valid, perfected, first priority security interest in certain funds that were held in commodity accounts in the name of Thomas Gibson (the "Commodity Account Funds") and which were recovered by the Trustee, Kathryn Pry (the "Gibson Trustee") in the Chapter 7 case of Thomas P. Gibson and Patsy M. Gibson, which case is currently pending in this Court as Case No. 10-93867-BHL-7A (the "Gibson Case"). The Gibson Trustee, however, cannot disburse the funds until such time as there is a judicial approval of their ownership, and First Bank is simply seeking judicial resolution as to the ownership of these funds.

First Bank will seek to obtain a determination of its rights to those funds in a proceeding in the Gibson Case in which all parties who could possibly assert an interest therein are named as parties, so that any determination in that proceeding will be binding on all such

parties. Although First Bank does not believe that Eastern Livestock Co., LLC ("ELC") has an interest in the Commodity Account Funds, First Bank nonetheless determined, out of an abundance of caution, that it would be prudent to join ELC as a defendant in a proceeding in the Gibson Case to ensure that all potentially necessary parties could be joined and a complete and efficient determination could be made by the Court. Thereafter, in the course of its due diligence, First Bank determined that the provisions of the confirmed Eastern ELC Chapter 11 Plan (the "Plan") *might* prevent it from naming ELC as a party to an action in the Gibson Case without the permission of this Court or consent of the ELC Trustee. Of course, First Bank promptly made several requests of counsel for the ELC Trustee to consent to this procedural anomaly, but each such request went unanswered. As a result, First Bank filed its Motion in this Court, which is the subject of the objections raised by the ELC Trustee and Fifth Third Bank ("Fifth Third")

Although the Motion articulates several reasons why First Bank believes that the ELC Trustee does not have an interest in the Commodity Account Funds, the *only* relief sought by First Bank in its Motion is the Court's permission to name ELC as a defendant in First Bank's proposed complaint to be filed in the Gibson Case in order to have any such interest judicially determined in the Gibson Case. Despite all the reasoning why ELC may not claim an interest in the funds, First Bank has not sought any determination of ELC's interest in First Bank's Motion – any rights of ELC remain intact if the Court grants the relief requested. A copy of First Bank's proposed complaint was attached to its Motion as an Exhibit. However, it appears from the objections, particularly Fifth Third's Objection, that ELC and Fifth Third may have misconstrued the Motion. To be clear, the Motion does not seek any determination from the Court in this

Chapter 11 case regarding ELC's interest in the Commodity Account Funds; rather, First Bank seeks only the Court's leave to join ELC in a proceeding in the Gibson Case.

Nevertheless, as stated above, First Bank filed the simple procedural request because the Plan *might* prevent First Bank from adding ELC to the proceeding without modification of the Plan. In light of the objections raised, however, it is now abundantly clear that, regardless of this Court's inherent power to modify the terms of that injunction, no modification is necessary, since the Court may grant the relief sought by First Bank by simply interpreting the Plan language, as opposed to modifying it.

A. Additional Procedural Background

On January 4, 2011, Kathryn Pry (the "Gibson Trustee") filed a Motion for Turnover seeking turnover of certain financial accounts held by ADM Investor Services, Inc. ("ADMIS") and/or its affiliates (the "Turnover Motion") and alleging that certain accounts held by ADMIS were property of the Gibson estate and must be turned over to the Gibson Trustee for administration. The Notice sent in connection with the Motion (Gibson Docket #51) indicates that both ELC counsel and its Trustee received notice of the Motion. No objections to the Turnover Motion were filed and the Court entered an Order on January 12, 2011 granting the Turnover Motion. [Gibson Docket No. 71]. As evidenced by the Gibson Trustee's Form 2 filed for the period ending March 29, 2011, the Gibson Trustee recovered a total of \$1,234,267.68 in Commodity Account Funds from ADMIS. That amount included \$171,531.79, which was held in a separate account by ADMIS subject to a control agreement in favor of First Bank.

The Gibson Trustee has continued to hold the funds received from ADMIS at all times since those funds were turned over by ADMIS. As noted above, the ELC Trustee did not object to the turnover of these funds to the Gibson Trustee and to date has taken no action to assert an interest in those funds. However, the ELC Trustee did file a proof of claim on behalf of ELC in the Gibson Case [Claim 48-1] alleging, *inter alia*, that the Gibsons were the recipients of fraudulent transfers in an unspecified amount and were the recipients of preferential transfers from the Debtor totaling no less than \$1,135,045,746.83 (the "ELC Proof of Claim").

The Statement of Claim attached to the ELC Proof of Claim contains no information whatsoever from which one could possibly conclude that ELC claimed any interest in the Commodity Account Funds. In addition, while the First Amended Disclosure Statement for the First Amended Chapter 11 Plan of Liquidation [Docket No. 1489] filed herein on October 26, 2012 contained a rather exhaustive summary of the assets of the ELC estate available to fund its proposed plan, it did not specifically assert any rights in the Commodity Account Funds held by the Gibson Trustee or reference any intended litigation with respect to the funds, making only one reference in a small footnote on page 39 of the First Amended Disclosure Statement, which stated that: "The trustee for the Gibson estate also seized certain funds in one of Tommy Gibson's brokerage accounts. The Trustee has not completed his investigation of ELC's claims to those funds."

During the course of First Bank's due diligence to determine the identity of all parties who might claim an interest in the proceeds of the Gibson's commodities accounts, First Bank reviewed the ELC Claim filed in the Gibson Case and, even though it did not refer to any specific claim of entitlement to the Commodity Account Funds, the fact that it referred to

unspecified fraudulent transfers and preferences alleged to have been made to the Gibsons, indicated a possible claim by Eastern to those funds. The remaining claims asserted in ELC's proof of claim appeared to relate solely to unsecured claims made by ELC and therefore did not appear to be germane to any claim it could assert to the Commodity Account Funds. Accordingly, it appeared that ELC no longer intended to file an avoidance action relating to those funds by reason of Code Section 546(a).

Since neither ELC or its Trustee had taken any action to assert an interest in the commodity accounts in the nearly three (3) years since the ELC Order for Relief was entered, and having no reason to believe that ELC intended to insert an interest in the funds, First Bank reached out to the ELC Trustee's counsel on multiple occasions seeking to determine whether the ELC Trustee was willing to agree to the relief sought by the Motion prior to filing the Motion as evidenced by the emails attached hereto as Exhibit 1. No reply was received from the ELC Trustee until the filing of the ELC Trustee's Objection to the Motion.

Notwithstanding the arguments raised by the ELC Trustee and Fifth Third in their objections, the only issue before the Court is whether the terms of the ELC Plan bar First Bank from naming ELC as a defendant pursuant to its proposed complaint and, if so, whether the Court may modify those provisions of the Plan. The alternative of First Bank obtaining an adjudication of its rights to the Commodity Account Funds in the Gibson Case in which ELC is not a party could leave First Bank, and potentially other parties, open to a possible second action if ELC decides it ever wishes to assert some rights. Such a bifurcated proceeding makes no sense from an administrative perspective, and the interests of judicial economy would clearly be

served by having the rights to the funds in question determined in a single proceeding in the Gibson Case where the funds are held.

## II. ARGUMENT

### A. The ELC Plan Does Not Prevent ELC From Being Named as a Defendant to an Action in the Gibson Case

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The ELC Trustee first argues that the Court may not modify the language of the Plan Injunction found in Section 7.5 of its confirmed Chapter 11 Plan based on Section 1127 of the Code which, as the ELC Trustee asserts, requires that a modification be sought by the proponent of the Plan. The limitations on modifying a Chapter 11 Plan set forth in the Code are premised on the concept that a Chapter 11 Plan is a contract between the Debtor and its creditors and thus should not be subject to modification in circumstances where a contract would not otherwise be subject to modification. Thus, as with a contract, courts distinguish modification of a Plan from their ability to clarify a plan where a plan is silent or ambiguous, and/or interpret plan provisions to further equitable concerns. See e.g., Beal Bank v. Jack's Marine, Inc., 201 B.R. 376, 380 (E.D. Pa. 1996); Terex Corp. v. Metropolitan Life Insurance Co., 984 F.2d 170, 173 (6th Cir. 1993), particularly where the substantive rights of the claimants remain unchanged. In re Johns-Manville Corporation, 920 F.2d at 128-29. As discussed in greater detail below, a literal reading of the language of Section 7.5 of ELC's confirmed Chapter 11 Plan does not bar a determination of ELC's interest, if any, in the Commodity Account Funds in the Gibson Case.

Moreover, courts have inherent power to exercise their power over the injunctive provisions of a Chapter 11 Plan notwithstanding the contractual basis that otherwise underlies the enforceability of a Plan. "Any court that issues an injunction has the authority to modify the

injunction for good cause on the motion of a person adversely affected by it. Hendrix, 986 F.2d at 198." Pettibone Corp. v. Hawxhurst, 163 B.R. 989, 996 (N.D. Ill. 1994), *aff'd*, 40 F.3d 175 (7th Cir. 1994). See also In re Shondel, 950 F.2d 1301, 1304 (7th Cir. 1991). Although these cases involved the statutory bankruptcy discharge injunction, if a bankruptcy court possesses the inherent power to modify a statutory injunction as the foregoing cases indicate, then it stands to reason that a bankruptcy court possesses the inherent authority to modify a contractually-based injunction for good cause on the motion of a person adversely affected by it.

In any event, regardless of the Court's inherent power to modify a plan injunction, Article 7.5 of the ELC Plan indicates that it does not bar a determination of ELC's claims to the Commodity Account Funds in a single proceeding in the Gibson Case. The first sentence of Article 7.5 of the Plan is effectively summarized by the second sentence, which reads "This injunction applies to any action or proceeding that affects or seeks possession of Property of the Estate." However, the language of Article 7.5 creates an exception to that injunction to the extent that there is a dispute over whether "any particular asset is Property of the Estate, such dispute is not affected by this injunction until such dispute is resolved." Since the Debtor's Objection suggests that there may be a dispute regarding whether the Commodity Account Funds may be Property of the Estate, the final sentence of Article 7.5 applies, which provides that any such dispute "shall be brought and prosecuted only in the Bankruptcy Court, subject to any jurisdictional limitation." (Emphasis added).

ELC's Chapter 11 Plan contains 104 defined terms. The term "Bankruptcy Court" is not one of those defined terms. In contrast, the term "Chapter 11 Case" is defined in Article 2.18 of the Plan and "means the Chapter 11 Case of the Debtor pending in the Court and

captioned as In re ELC Livestock Co., LLC, Case No. 10-93904-BHL-11." Thus, had the ELC Plan intended to contractually limit the forum available to third parties to prosecute a dispute relating to Property of the Estate to the ELC case, the Debtor could have drafted Article 7.5 to provide that such disputes be prosecuted only in the "Chapter 11 Case" as opposed to only in the "Bankruptcy Court." Thus, the literal language of Article 7.5 permits First Bank to file its Complaint relating to the Commodity Account Funds in the Gibson Case, even if it involves Property of the Estate, since such action will be prosecuted in the Bankruptcy Court. Even if the clause is ambiguous, the interests of judicial economy will be clearly served by determining the rights of all parties to the Commodity Account Funds in a single proceeding in the Gibson Case.

Moreover, if, as the ELC Trustee asserts, the filing of its proof of claim in the Gibson was tantamount to the filing of a complaint asserting an interest in the Commodity Account Funds, then by filing its claim in the ELC Case, the ELC Trustee has already submitted the determination of its interest in those funds to the jurisdiction of the Bankruptcy Court in the Gibson Case. Having submitted to the jurisdiction of that Court, the ELC Trustee is estopped from arguing that its Plan prevents the Gibson Court from making a determination of ELC's interest in those funds.

B. First Bank's Motion Does Not Violate The Provisions of the Settlement Agreement Between First Bank and ELC

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The ELC Trustee next suggests that the filing of the Motion before the Court violates the terms of the settlement agreement between First Bank and the Trustee pursuant to which First Bank agreed not to participate in the ELC Case. First Bank filed its Motion only after the ELC Trustee's counsel failed to respond to First Bank's repeated efforts to seek the ELC

Trustee's consent to the relief sought by the Motion. First Bank's only purpose in filing its Motion was to seek this Court's permission to join ELC in the Gibson Case in order to avoid any need to participate in the ELC Case. Had First Bank not filed its Motion, based on the position taken by the ELC Trustee in his objection, ELC would likely have alleged contempt had First Bank filed its proposed complaint in the Gibson Case naming ELC as a party. The position taken by the ELC Trustee in response to First Bank's Motion would force First Bank to participate in the ELC Case in order to protect its rights in the event that ELC would bring a subsequent action in the ELC Case to determine ELC's interest in the Commodity Account Funds that First Bank seeks to have determined in the Gibson Case.

A review of the settlement agreement [Docket No. 1498-1] makes it clear that First Bank's agreement not to participate was limited to participation in the ELC Case, since it referred participation in "the Chapter 11 Case" and the Gibson Case is a Chapter 7 Case. Indeed, the Settlement Agreement recognized that First Bank and the ELC Trustee could remain adverse with respect to funds that were not part of the Chapter 11 Case, including the funds that were seized and held by the Department of Agriculture and which are the subject of a separate forfeiture proceeding and contemplated the use of "best efforts" with respect to that resolution. Even if the instant motion could be construed as some technical "participation" violation of literal settlement language, a party enjoys qualified immunity to seek to protect its own legal interests.

First Bank's actions in seeking a determination of its rights to the Commodity Account Funds are not overly litigious as the ELC Trustee alleges. The Gibsons granted First Bank a security agreement in all of their commodity accounts. First Bank's proposed complaint

is the kind of action routinely taken by secured creditors whose collateral is in the possession of a Chapter 7 Trustee where the secured creditor and the Chapter 7 Trustee are otherwise unable to agree on the secured creditor's rights to its collateral. One of the primary functions of a Bankruptcy Court is to resolve disputes of this nature and First Bank merely seeks to achieve some progress toward resolution of an Estate now approaching its fourth year.

C. Although First Bank Believes That Section 546(a) Would Bar ELC from Bringing an Avoidance Action Relating to the Commodity Account Funds, the Motion Does Not Seek a Determination on That Issue

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As indicated above, at the time First Bank filed its Motion, it was not clear whether ELC intended to assert an interest in the Commodity Account Funds, in part based on the ELC Trustee having effectively waived its claims to the Commodity Account Funds held by the Gibson Trustee by failing to bring an action under Sections 544, 547, or 548 of the Code to avoid a transfer of the funds deposited in Gibson's commodity accounts within the two-year time period under Section 546(a) of the Code. Although that issue is not before the Court for determination at this time, the likelihood that ELC has waived its right to bring an avoidance action may be a relevant consideration in determining in which case the issues relating to ELC's interest in the Commodity Account Funds ought to be determined.

ELC's Objection asserts that its filing of a proof of claim in the Gibson Case satisfied any applicable statute of limitations in establishing the Trustee's rights in the Commodity Account Funds based on case law holding that the filing of a claim is tantamount to the filing of a complaint in a civil action. Even if this were correct, the proof of claim that the ELC Trustee filed was not tantamount to the filing of a complaint seeking to avoid a transfer from ELC to Gibson relating to the Commodity Account Funds. Assuming, *arguendo*, that the

proof of claim was tantamount to filing a complaint, the proof of claim does not satisfy the pleading standards established by Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009). Paragraphs 5 a. through 5 c. of the Statement of Claim attached to the Trustee's proof of claim identify certain transactions that the ELC Trustee may have constituted fraudulent transfers, however any mention of any transfer involving the Gibson commodity accounts is conspicuously absent from the list. Paragraph 5 d. refers to transfers made to Gibson within a year of the bankruptcy, but there is no information as to the date of the transfers. Thus, the proof of claim makes no plausible claim that funds that were in the Gibson commodity accounts were derived from any fraudulent transfer or other transfer made within a year of the filing of the petition.

More importantly, the fact that the Trustee did not view his filing of the Proof of Claim as tantamount to the filing of an avoidance action is established by the Trustee's own Statement of Claim attached to the ELC claim. Paragraph 6 provides that:

"The ELC Trustee is investigating the merits of these and other claims against the Gibsons and may commence an adversary proceeding to assert such claims. However, the ELC Trustee needs to conduct further discovery of the Gibsons before proceeding."

If the ELC Claim was tantamount to instituting an avoidance action, there would have been no reason to reserve the right to file an avoidance action. In any event, although the the ELC Trustee reserved the right to commence an adversary proceeding to assert a claim to the Commodity Account Funds held by the Gibson Trustee, the fact is that he did not commence an adversary proceeding within the two-year period under Section 546(a).

The ELC Trustee's proof of claim was nothing more than an unsecured claim in the Gibson Case. If allowed, it would entitle the Trustee to a pro rata dividend in the Gibson case, and nothing more. Thus, whether it is deemed allowed at this stage of the proceeding is irrelevant to the Trustee's attempt to avoid the application of Section 546(a). Requiring the Trustee to seek relief from the stay and file a fraudulent transfer complaint against the Gibson Trustee does not nullify the Bankruptcy Code's claim filing and allowance provisions, as the Trustee alleges. Apart from the provisions applicable to secured claims, the claim filing and allowance provisions applicable to unsecured claims have nothing to do with determining the rights of parties to specific property of the estate; instead, they merely determine the amount of a party's claims for purposes of determining the party's pro rata share of any distribution to unsecured creditors from the estate. Allowance of the ELC Trustee's proof of claim in the Gibson Case will not result in the Trustee receiving one dime more than if his claim arose out of the sale of cattle. Indeed, the absurdity of the Trustee's position is evident from that fact if First Bank were to file its proposed complaint without naming ELC as a party and if Court determined that First Bank was entitled to the funds, the allowance of ELC's claim in the Gibson Case would not result in ELC receiving any distribution attributable to the Commodity Account Funds.

- D. Although First Bank Believes That ELC Has No Basis for Asserting a Claim to the Commodity Account Funds Against the Gibson Trustee as a Custodian Under Section 543 and that the Gibson Trustee Likely Has an Affirmative Defense to any Claim Asserted Under Section 543, the Motion Does Not Seek a Determination of Those Issues
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ELC's final objection relates to its claim that the Gibson Trustee is holding property of the ELC Estate that is subject to turnover under Section 542 and/or that the Gibson Trustee is holding the Commodity Account Funds in the capacity of a custodian for the benefit

of the ELC Estate and is obligated to turnover such property pursuant to Section 543. However, the Bankruptcy Code makes it clear that the Gibson Trustee is not a “custodian” within the meaning of the Bankruptcy Code. Code Section 101(11) provides:

"The term "custodian" means –

(A) receiver or trustee of any property of the debtor, appointed in a case or proceeding not under this title (emphasis added);

(B) assignee under a general assignment for the benefit of the debtor's creditors; or

(C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors." (emphasis added)

The Gibson Trustee is not a custodian within the meaning of subparagraph (A) since the Gibson Trustee was appointed under Title 11. Subparagraph (B) is inapplicable and subparagraph (C) applies only if the trustee is appointed for the purpose of administering the property "for the benefit of the debtor's creditors." Here, the Gibson Trustee was appointed for the purpose of administering the property for the benefit of the Gibsons' creditors, not ELC's creditors. The legislative history of Section 101(11) reveals a further flaw in the Trustee's argument by making it clear that it is intended to apply to a pre-petition liquidator of a debtor's property. House Report No. 95-595, 95th Cong. 1st. Sess. 309-310 (1977). Likewise, the quotation from the Senate Report contained in the ELC Trustee's objection likewise refers to a "custodian appointed before the bankruptcy case."

The Trustee's argument that ELC has a right of recovery under Section 542 is difficult to evaluate as it is dependent on the existence of a property right under non-bankruptcy law and the Trustee has never articulated the basis of any alleged property right in the funds that were held in Gibson's commodity accounts. Indeed, the ELC Trustee has never asserted that ELC has such a property right; his objection merely indicates that it may have such a right.

Both the Trustee and Fifth Third suggest that some of the funds may have been derived from Gibson's well-publicized check-kiting scheme. If that is the case, then perhaps the reason that the Trustee has failed to assert a timely claim for fraudulent conveyance is that the Trustee recognizes that the same *in pari delecto* defense that he recognized in his disclosure statement would likely bar any non-bankruptcy cause of action against Fifth Third Bank, and would also likely bar any claim of the estate to funds held by the Gibson Trustee to the extent that such funds were derived from a check-kiting scheme in which ELC and Gibson were co-conspirators.

### III. CONCLUSION

First Bank's Motion seeking this Court's permission to name ELC as a party to the proposed complaint to be filed in the Gibson Case should be granted. The injunction contained in ELC's Plan does not enjoin the filing of the proposed complaint since it contains an exception relating to resolution of disputes by the "Bankruptcy Court" and the dispute that the proposed complaint seeks to resolve will be resolved by the Bankruptcy Court, albeit in the Gibson Case. Even were the injunction deemed to bar such an action, the Court retains the inherent power to modify the injunction in the interests of justice. First Bank's filing of its Motion does not constitute a breach of its agreement not to participate in the ELC Case. The relief sought by the

Motion is the right to proceed with First Bank's proposed complaint in the Gibson Case without the prospect of having to defend potential contempt allegations from the Trustee. The Motion does not seek any determination whether ELC has any interest in the Commodity Account Funds. The purpose of naming Eastern as a defendant in the proposed complaint is to have its interest in those funds, if any, determined in the Gibson Case, not the ELC Case.

Respectfully submitted,

/s/ Bret S. Clement

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Bret S. Clement (#3708-49)  
Ayres Carr & Sullivan, P.C.  
251 East Ohio Street, Suite 500  
Indianapolis, IN 46204-2184  
Tel. 317-636-3471/Fax 317-636-6575  
E-mail: bclement@acs-law.com

Attorneys for The First Bank and Trust  
Company

**CERTIFICATE OF SERVICE**

I certify that on the 24<sup>th</sup> day of March, 2014, I electronically filed the foregoing Reply of The First Bank and Trust Company to Eastern Livestock Trustee's Objection to First Bank's Motion to Modify Plan Injunction with the Clerk of Courts using the CM/ECF system, which will send notification of such filing to CM/ECF participants, and I hereby certify that I have mailed by United States Postal Service the document to the non-CM/ECF participants:

David L. Abt  
davidabt@mwt.net

C. R. Bowles, Jr  
cbowles@bgdlegal.com

John Hunt Lovell  
john@lovell-law.net

Mark A. Robinson  
mrobinson@vhrlaw.com

Jeffrey R. Erler  
jerler@ghjhlaw.com

Edward M King  
tking@fbtlaw.com

Randall D. LaTour  
rdlatour@vorys.com

John R. Carr, III  
jrciii@acs-law.com

Bret S. Clement  
bclement@acs-law.com

Terry E. Hall  
terry.hall@faegrebd.com

Kevin M. Toner  
kevin.toner@faegrebd.com

John Frederick Massouh  
john.massouh@sprouselaw.com

John W. Ames  
james@bgdlegal.com

Robert Hughes Foree  
robertforee@bellsouth.net

Kim Martin Lewis  
kim.lewis@dinslaw.com

Jeremy S Rogers  
Jeremy.Rogers@dinslaw.com

Ivana B. Shallcross  
ishallcross@bgdlegal.com

Deborah Caruso  
dcaruso@daleeke.com

Meredith R. Thomas  
mthomas@daleeke.com

William Robert Meyer, II  
rmeyer@stites.com

Allen Morris  
amorris@stites.com

Charles R. Wharton  
Charles.R.Warton@usdoj.gov

James Bryan Johnston  
bjtexas59@hotmail.com

James T. Young  
james@rubin-levin.net

David L. LeBas  
dlebas@namanhowell.com

Judy Hamilton Morse  
judy.morse@crowedunlevy.com

John M. Thompson  
john.thompson@crowedunlevy.com

Suzanne M Shehan  
suzanne.shehan@kutakrock.com

John Huffaker  
john.huffaker@sprouselaw.com

Matthew J. Ochs  
kim.maynes@moyewhite.com

Laura Day Delcotto  
ldelcotto@dlgfir.com

Kelly Greene McConnell  
lisahughes@givenspursley.com

Andrew James Vandiver  
avandiver@aswdlaw.com

Todd J. Johnston  
tjohnston@mcjllp.com

Timothy T. Pridmore  
tpridmore@mcjllp.com

Theodore A Konstantinopoulos  
ndohbky@jbandr.com

Karen L. Lobring  
lobring@msn.com

Sandra D. Freeburger  
sfreeburger@dsf-atty.com

Lisa Koch Bryant  
courtmail@fbhlaw.net

Elliott D. Levin  
edl@rubin-levin.net

John M. Rogers  
johnr@rubin-levin.net

John David Hoover  
jdhoover@hooverhull.com

Sean T. White  
swhite@hooverhull.com

Jay P. Kennedy  
jpk@kgrlaw.com

John R. Burns  
john.burns@faegrebd.com

Michael W. McClain  
mike@kentuckytrial.com

William E Smith  
wsmith@k-glaw.com

Kayla D. Britton  
kayla.britton@faegrebd.com

James Edwin McGhee  
mcghee@derbycitylaw.com

Thomas C Scherer  
tscherer@bgdlegal.com

David A. Laird  
david.laird@moyewhite.com

Amanda Dalton Stafford  
ads@kgrlaw.com

Matthew R. Strzynski  
mstrzynski@kdlegal.com

Trevor L. Earl  
tearl@rwsvlaw.com

David Alan Domina  
dad@dominalaw.com

Kent A Britt  
kabritt@vorys.com

Joshua N. Stine  
kabritt@vorys.com

Jill Zengler Julian  
Jill.Julian@usdoj.gov

Jeffrey L Hunter  
jeff.hunter@usdoj.gov

Amelia Martin Adams  
aadam@dlgfir.com

Michael Wayne Oyler  
moyler@rwsvlaw.com

Jason W. Cottrell  
jwc@stuartlaw.com

Robert A. Bell  
rabell@vorys.com

James E. Rossow  
jim@rubin-levin.net

James B. Lind  
jblind@vorys.com

Melissa S. Giberson  
msgiberson@vorys.com

Steven A. Brehm  
sbrehm@bgdlegal.com

Anthony G. Raluy  
traluy@fbhlaw.net

U.S. Trustee  
ustpregion10.in.ecf@usdoj.gov

Patrick B Griffin  
pat.griffin@kutakrock.com

Jack S. Dawson  
jdawson@millerdollarhide.com

Dustin R. DeNeal  
dustin.deneal@faegrebd.com

Shawna M. Eikenberry  
shawna.eikenberry@faegrebd.com

Terry E. Hall  
terry.hall@faegrebd.com

Jay Jaffe  
jay.jaffe@faegrebd.com

James A. Knauer  
jak@kgrlaw.com

Erick P. Knoblock  
eknoblock@daleeke.com

Harmony A. Mappes  
harmony.mappes@faegrebd.com

Jessica Lynn Olsheski  
jessica.olsheski@justice-law.net

Shiv Ghuman O'Neill  
shiv.oneill@faegrebd.com

Wendy W. Ponader  
wendy.ponader@faegrebd.com

Niccole R. Sadowski  
nsadowski@thbklaw.com

Eric C. Redman  
ksmith@redmanludwig.com

Joe T. Roberts  
jratty@windstream.net

Joseph H. Rogers  
jrogers@millerdollarhide.com

James E. Smith  
jsmith@smithakins.com

Christopher E. Baker  
cbaker@thbklaw.com

Andrew D. Stosberg  
astosberg@lloydmc.com

Kevin M. Toner  
kevin.toner@faegrebd.com

Andrea L. Wasson  
andrea@wassonthornhill.com

Christopher M. Trapp  
ctrapp@rubin-levin.net

Eric W. Richardson  
ewrichardson@vorys.com

Joshua Elliott Clubb  
joshclubb@gmail.com

Jennifer Watt  
jwatt@kgrlaw.com

William K. Flynn  
wkflynn@strausstroy.com

Michael Benton Willey  
michael.willey@ag.tn.gov

Chrisandrea L. Turner  
clturner@stites.com

Scott R. Leisz  
sleisz@bgdlegal.com

Terrill K. Moffett  
kendalcantrell@moffettlaw.com

Matthew Daniel Neumann  
mneumann@hhclaw.com

Chad Duane Wuertz  
chad@wuertzlaw.com

Joe Lee Brown  
Joe.Brown@Hardincounty.biz

Thomas P. Glass  
tpglass@strausstroy.com

Kay Dee Baird  
kbaird@kdlegal.com

Paul M. Hoffman  
phoffmann@stinson.com

Brian H. Meldrum  
bmeldrum@stites.com

Natalie Donahue Montell  
nmontell@bgdlegal.com

Brian Robert Pollock  
bpollock@stites.com

Ben T. Caughey  
ben.caughey@icemiller.com

Stephen E. Schilling  
seschilling@strausstroy.com

David W. Brangers  
dbrangers@lawyer.com

Martha R. Lehman  
mlehman@kdlegal.com

Kevin J. Mitchell  
kevin.mitchell@faegrebd.com

Erin Casey Nave  
enave@taftlaw.com

Steven Eric Runyan  
ser@kgrlaw.com

/s/ Bret S. Clement

---

Bret S. Clement

**Exhibit 1**

**John Carr**

---

**From:** Bret Clement  
**Sent:** Tuesday, December 31, 2013 1:18 PM  
**To:** Hall, Terry E. (Terry.Hall@bakerd.com)  
**Cc:** jrciii@acs-law.com  
**Subject:** Gibson Commodity Accounts  
**Attachments:** MOTION TO MODIFY AUTOMATIC STAY AND PLAN INJUNCTION TO PERMITNAMING.doc

Terry

We intend to file a complaint in the Gibson case to determine who is entitled to the approximately \$1.2 million in funds that the Gibson trustee recovered from the Gibson's commodity accounts. For the reasons indicated in the attached motion, we believe that it is necessary to join Eastern Livestock as a party to the complaint to answer as to its interests in the funds, if any. However, as set forth in the motion, the provisions of Eastern's Plan prohibit us from doing so in the absence of a court order in the Eastern case.

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Best wishes for a happy new year from John and I.

Bret S. Clement  
Ayres Carr & Sullivan, P.C.  
251 East Ohio Street, Suite 500  
Indianapolis, IN 46204



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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF INDIANA  
NEW ALBANY DIVISION

IN RE: )  
 )  
EASTERN LIVESTOCK CO., LLC, ) CASE NO. 10-93904-BHL-11  
 )  
Debtor. )

**MOTION TO MODIFY AUTOMATIC STAY AND PLAN  
INJUNCTION TO PERMIT NAMING DEBTOR AS A  
DEFENDANT IN COMPLAINT TO DETERMINE VALIDITY,  
EXTENT, AND PRIORITY OF LIENS AND FOR ORDER  
DIRECTING PAYMENT OF COMMODITIES ACCOUNT  
PROCEEDS TO THE FIRST BANK AND TRUST COMPANY FOR  
PURPOSE OF ASSERTING DEBTOR'S INTEREST, IF ANY, THEREIN**

The First Bank and Trust Company ("First Bank"), by counsel, for its Motion to Modify Automatic Stay and Plan Injunction to Permit Naming Debtor as a Defendant in Complaint to Determine Validity, Extent, and Priority of Liens and for Order Directing Payment of Commodities Account Proceeds to The First Bank and Trust Company for Purposes of Asserting Debtor's Interest, if any, Therein, states as follows:

1. First Bank is a secured creditor of Thomas P. Gibson and Patsy M. Gibson (the "Gibsons"). The Gibsons filed a Chapter 7 Case on December 1, 2010, which case is currently pending in this Court as Case No. 10-93867-BHL-7A (the "Gibson Case").

2. First Bank intends to file a Complaint to Determine Validity, Extent, and Priority of Liens and for Order Directing Payment of Commodities Account Proceeds to The First Bank and Trust Company (the "Proposed Complaint") in the Gibson Case. A copy of the Proposed Complaint is attached hereto and made a part hereof as Exhibit "A".

3. The Chapter 11 Trustee for Eastern Livestock Co., LLC (the "Debtor") filed a proof of claim for the Debtor in the Gibson Case [Claim 48-1] alleging, among other things, that the Gibsons were the recipients of fraudulent transfers in an unspecified amount and were the

recipients of preferential transfers from the Debtor totaling no less than \$1,135,045,746.83 (the “ELC Proof of Claim”). The ELC Proof of Claim contained no itemization of the transfers alleged to be fraudulent or preferential or any other information from which one could possibly determine whether a specific transfer was included in the more than a billion dollars of transfers alleged to be fraudulent and/or preferential. Consequently, it is not possible to determine from the ELC Proof of Claim whether any funds that were used to acquire commodities contracts held in the commodities accounts that are the subject of the Proposed Complaint involved transfers included in the transfers alleged to be fraudulent or preferential transfers in the ELC Proof of Claim.

4. Pursuant to Section 546(a) of the Code, the two (2) year time period in which the Debtor could have commenced an action under Sections 544, 547, or 548 of the Code to avoid a transfer has expired. The Debtor has not withdrawn or otherwise amended the ELC Proof of Claim notwithstanding the lapse of the time period set forth in Section 546(b) of the Code.

5. Pursuant to Section 101(a)(5) of the Code, a claim is defined as a right to payment. While a transferee of a transfer that is avoided under Sections 544, 547, or 548 may liable for a monetary amount to the extent set forth in Section 550 of the Code, the avoidance of the transfer that gives rise to such liability is a condition precedent to the existence of any such liability. Consequently, the Debtor has no right to payment from the Gibson estate due to its failure to bring an action to avoid any transfer alleged to be a fraudulent and/or preferential transfer within the time limits set forth in Section 546(b) of the Code.

6. Article 7.5 of the Trustee’s Chapter 11 Plan of Liquidation (the “Plan”), confirmed by the this Court’s Order dated December 17, 2012, enjoins any person from

“commencing . . . any action or proceeding (whether directly, indirectly, derivatively or otherwise) on account of or respecting any Claim, debt, interest or right of Debtor as well as on account of or respecting any Cause of Action or Bankruptcy Cause of Action which the Trustee retains sole and exclusive authority to pursue in accordance with this Plan.”

7. In addition, Article 7.6 of the Plan provides that “Unless otherwise provided herein or by an order of the Court, all injunctions or stays provided for in the Chapter 11 Case pursuant to Sections 105 or 362 of the Bankruptcy Code, or otherwise, and in existence on the Confirmation Date, shall remain in full force and effect until all distributions required to be made under this Plan have been made.”

8. Since the time limit set forth in Section 546(b) of the Code is not jurisdictional, any determination by this Court in the Gibson Case that First Bank or any other party is entitled to the funds in the commodities accounts that are the subject of the Proposed Complaint would be subject to the claims, if any, of the Debtor unless the Debtor is named as a defendant in the Proposed Complaint to answer as to its interest, if any, therein.

9. As indicated above, First Bank does not believe that the Debtor can successfully assert a claim to any funds that were in held in the commodities accounts that are the subject of the Proposed Complaint by reason of the Debtor’s failure to commence an adversary proceeding under Sections 544, 547, or 548 of the Bankruptcy Code within the time period set forth in Section 546(b) of the Code.

10. Although the Debtor’s alleged claims included in its ELC Proof of Claim could be asserted claims by way of set off against any claims that the Gibson Trustee might have brought against the Debtor, the issues raised by the Proposed Complaint are not likely to result in the

Gibson Trustee asserting a cross-claim against the Debtor that the Debtor's alleged claims could set off against.

11. Moreover, since the time in which an action under Sections 544, 547, or 548 had already passed as of the date that the Debtor's Plan was confirmed, it is unlikely that the intent of Article 7.6 of the Plan was to prevent third parties from determining their respective rights to funds as to which the only interest of the Estate was a time barred claim; rather, the intent was to protect those pending claims as to which the Estate had timely asserted its interest.

WHEREFORE, First Bank respectfully requests that the Court enter an Order as contemplated by Article 7.6 of the Plan to authorize First Bank to name the Debtor as a defendant in its Proposed Complaint to answer to its interest, if any, in the proceeds held by the Gibson's Trustee from the commodities accounts that are the subject of the Proposed Complaint.

/s/ Bret S. Clement

---

Bret S. Clement (#3708-49)  
Ayres Carr & Sullivan, P.C.  
251 East Ohio Street, Suite 500  
Indianapolis, IN 46204-2184  
Tel. 317-636-3471/Fax 317-636-6575  
E-mail: bclement@acs-law.com

**John Carr**

---

**From:** John Carr  
**Sent:** Thursday, January 09, 2014 12:19 PM  
**To:** 'Terry.Hall@bakerd.com'  
**Subject:** FW: Gibson Commodity Accounts  
**Attachments:** MOTION TO MODIFY AUTOMATIC STAY AND PLAN INJUNCTION TO PERMITNAMING.doc

Terry:

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Haven't talked to you in forever. Hope you are doing good.

John

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Indianapolis, IN 46204-2186  
Tel. 317-636-3471  
Fax 317-636-6575  
Email: [jrciii@acs-law.com](mailto:jrciii@acs-law.com)  
Website: [www.acs-law.com](http://www.acs-law.com)



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**To:** Hall, Terry E. (Terry.Hall@bakerd.com)

Cc: jrciii@acs-law.com

Subject: Gibson Commodity Accounts

Terry

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## John Carr

---

**From:** Hall, Terry E. <Terry.Hall@FaegreBD.com>  
**Sent:** Thursday, January 09, 2014 4:55 PM  
**To:** John Carr  
**Subject:** RE: Gibson Commodity Accounts

Hi John – I had forgotten this (and actually don't remember). Let me check.

### Terry E Hall

*Partner*  
terry.hall@FaegreBD.com

**Direct:** +1 317 237 1230  
**FAX:** +1 317 237 8418  
**Mobile:** +1 317 370 7583

FaegreBD.com Download vCard

### FAEGRE BAKER DANIELS LLP

300 N. Meridian Street  
Suite 2700  
Indianapolis, IN 46204, USA  
Firm 317 237 0300

**From:** John Carr [mailto:jrciii@acs-law.com]  
**Sent:** Thursday, January 09, 2014 12:19 PM  
**To:** Hall, Terry E.  
**Subject:** FW: Gibson Commodity Accounts

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Haven't talked to you in forever. Hope you are doing good.

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Tel. 317-636-3471  
Fax 317-636-6575  
Email: [jrciii@acs-law.com](mailto:jrciii@acs-law.com)  
Website: [www.acs-law.com](http://www.acs-law.com)



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## John Carr

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**From:** Hall, Terry E. <Terry.Hall@FaegreBD.com>  
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**Subject:** RE: Gibson Commodity Accounts

John – I have asked Kevin Toner and Dustin about this – let me check with them again.

### Terry E Hall

*Partner*  
terry.hall@FaegreBD.com

**Direct:** +1 317 237 1230  
**FAX:** +1 317 237 8418  
**Mobile:** +1 317 370 7583

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### FAEGRE BAKER DANIELS LLP

300 N. Meridian Street  
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Firm 317 237 0300

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**John Carr**

---

**From:** John Carr  
**Sent:** Wednesday, January 15, 2014 2:50 PM  
**To:** 'Hall, Terry E.'  
**Subject:** RE: Gibson Commodity Accounts

Thanks, Terry.

John R. Carr III  
Ayres Carr & Sullivan, P.C.  
251 East Ohio Street, Suite 500  
Indianapolis, IN 46204-2186  
Tel. 317-636-3471  
Fax 317-636-6575  
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**From:** Hall, Terry E. [<mailto:Terry.Hall@FaegreBD.com>]  
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**Terry E Hall**  
*Partner*  
[terry.hall@FaegreBD.com](mailto:terry.hall@FaegreBD.com)

**Direct:** +1 317 237 1230  
**FAX:** +1 317 237 8418  
**Mobile:** +1 317 370 7583

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**FAEGRE BAKER DANIELS LLP**

300 N. Meridian Street  
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Firm 317 237 0300

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**From:** Bret Clement  
**Sent:** Tuesday, December 31, 2013 1:18 PM  
**To:** Hall, Terry E. ([Terry.Hall@bakerd.com](mailto:Terry.Hall@bakerd.com))

Cc: [jrciii@acs-law.com](mailto:jrciii@acs-law.com)

Subject: Gibson Commodity Accounts

Terry

We intend to file a complaint in the Gibson case to determine who is entitled to the approximately \$1.2 million in funds that the Gibson trustee recovered from the Gibson's commodity accounts. For the reasons indicated in the attached motion, we believe that it is necessary to join Eastern Livestock as a party to the complaint to answer as to its interests in the funds, if any. However, as set forth in the motion, the provisions of Eastern's Plan prohibit us from doing so in the absence of a court order in the Eastern case.

Since the funds are being held by the Gibson Trustee, it appears to make sense to have all claims to those funds that could be asserted be determined in a single proceeding in the Gibson case. To that end, we were hoping that the Eastern might be willing to enter into an agreed entry relating to the relief sought in the attached motion. Please let John or I know whether you or willing to enter into an agreed entry.

Best wishes for a happy new year from John and I.

Bret S. Clement  
Ayres Carr & Sullivan, P.C.  
251 East Ohio Street, Suite 500  
Indianapolis, IN 46204

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**John Carr**

---

**From:** John Carr  
**Sent:** Monday, January 27, 2014 10:54 AM  
**To:** 'Hall, Terry E.'  
**Subject:** RE: Gibson Commodity Accounts

Terry:

Have we heard back from Kevin or Dustin?

John

John R. Carr III  
Ayres Carr & Sullivan, P.C.  
251 East Ohio Street, Suite 500  
Indianapolis, IN 46204-2186  
Tel. 317-636-3471  
Fax 317-636-6575  
Email: [jrciii@acs-law.com](mailto:jrciii@acs-law.com)  
Website: [www.acs-law.com](http://www.acs-law.com)



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**From:** Hall, Terry E. [<mailto:Terry.Hall@FaegreBD.com>]  
**Sent:** Wednesday, January 15, 2014 2:45 PM  
**To:** John Carr  
**Subject:** RE: Gibson Commodity Accounts

John – I have asked Kevin Toner and Dustin about this – let me check with them again.

**Terry E Hall**

*Partner*

terry.hall@FaegreBD.com

**Direct:** +1 317 237 1230

**FAX:** +1 317 237 8418

**Mobile:** +1 317 370 7583

FaegreBD.com Download vCard

**FAEGRE BAKER DANIELS LLP**

300 N. Meridian Street

Suite 2700

Indianapolis, IN 46204, USA

Firm 317 237 0300

**From:** John Carr [<mailto:jrciii@acs-law.com>]

**Sent:** Thursday, January 09, 2014 12:19 PM

**To:** Hall, Terry E.

**Subject:** FW: Gibson Commodity Accounts

Terry:

Have you had a chance to consider this matter yet? Bret and I would rather reach agreement with the ELC estate, or agree to disagree, whichever. We are being pressed to move forward as the Gibson estate is now beginning to wind down towards closure.

Haven't talked to you in forever. Hope you are doing good.

John

John R. Carr III  
Ayres Carr & Sullivan, P.C.  
251 East Ohio Street, Suite 500  
Indianapolis, IN 46204-2186  
Tel. 317-636-3471  
Fax 317-636-6575  
Email: [jrciii@acs-law.com](mailto:jrciii@acs-law.com)  
Website: [www.acs-law.com](http://www.acs-law.com)



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**From:** Bret Clement  
**Sent:** Tuesday, December 31, 2013 1:18 PM  
**To:** Hall, Terry E. (Terry.Hall@bakerd.com)  
**Cc:** jrciii@acs-law.com  
**Subject:** Gibson Commodity Accounts

Terry

We intend to file a complaint in the Gibson case to determine who is entitled to the approximately \$1.2 million in funds that the Gibson trustee recovered from the Gibson's commodity accounts. For the reasons indicated in the attached motion, we believe that it is necessary to join Eastern Livestock as a party to the complaint to answer as to its interests in the funds, if any. However, as set forth in the motion, the provisions of Eastern's Plan prohibit us from doing so in the absence of a court order in the Eastern case.

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Best wishes for a happy new year from John and I.

Bret S. Clement  
Ayres Carr & Sullivan, P.C.  
251 East Ohio Street, Suite 500  
Indianapolis, IN 46204

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**John Carr**

---

**From:** Bret Clement  
**Sent:** Friday, January 31, 2014 1:29 PM  
**To:** Terry.Hall@bakerd.com  
**Cc:** jrciii@acs-law.com  
**Subject:** FW: Gibson Commodity Accounts  
**Attachments:** MOTION TO MODIFY AUTOMATIC STAY AND PLAN INJUNCTION TO PERMITNAMING.doc

Terry

We really need to get the ball rolling towards getting a resolution of the rights in commodities funds in the Gibson case. To that end we are going to go ahead and file the motion in the ELC case that we previously provided a draft of to you. Notwithstanding the filing of the motion, we continue to believe that an agreed entry makes sense to all parties concerned and we look forward to hearing from you in that regard.

Bret Clement

**From:** Bret Clement  
**Sent:** Tuesday, December 31, 2013 1:18 PM  
**To:** Hall, Terry E. (Terry.Hall@bakerd.com)  
**Cc:** jrciii@acs-law.com  
**Subject:** Gibson Commodity Accounts

Terry

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